

JERSEY / JUDGMENT

Nautech -v- CSS Ltd and Others

[2013] JRC 154 (31 July 2013)

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judgment

the deputy bailiff: 1.

Judgment

was delivered on 13 th May, 2013, on the application of the first, second, third and fifth defendants for the discharge of an Anton Piller order obtained by the plaintiff ex parte from the Bailiff on 11 th April, 2013. The full circumstances of the application and the Court's order for the discharge of the Anton Piller order are set out in the judgment to which I have referred. On delivery of the judgment, Advocate Sinel applied for an abridgment of time in order to bring an application for a springboard injunction. The application for an abridgment of time was refused. Advocate Sinel applied for leave to appeal the order, which was resisted. Advocate Baker indicated that his clients wanted to "depopulate" the Voyager programme on their information technology system, removing that material which might infringe the plaintiff's rights. 2. Advocate Sinel applied for leave to appeal the decision of the Court in relation to discharging the Anton Piller order. He was not able to identify the grounds of appeal on which he would rely. He also asked for a stay on the discharge of the Anton Piller order pending appeal. He asserted that the stay was necessary in respect of what was contained at paragraph 96(iv) of the Court's

judgment.

These applications were resisted by Advocate Baker upon the grounds that if leave were granted or a stay were granted, it was more likely than not that it became a reality that the new business would be strangled at birth. 3. I refused the application for leave to appeal. The Court had dealt with the application to discharge the Anton Piller in the usual way and had exercised its discretion in relation to the grant of other relief as set out at paragraph 96 of the judgment. There was no novel point of law and Advocate Sinel was not clear what his grounds of appeal might be. In the circumstances leave to appeal and any stay pending appeal was refused. 4. As to the application for an abridgment of time for a springboard application, I indicated that I approached a springboard injunction on the basis that such an order was a possibility in law but on the facts the Court was not satisfied that this was a case where it was appropriate. I drew

attention to the language in paragraph 93 of the Court's judgment where there was reference to "on the material in this case". I indicated that I was aware a date had been fixed for 3rd June for the hearing of the application, and it was not clear to me whether that application was still going ahead in the light of the abridgment of time being refused. 5. Both Advocate Baker and Advocate Sinel then applied for costs in relation to the order to discharge the Anton Piller order. I indicated to counsel that my immediate instincts had been that no order for costs was appropriate, but of course my mind was not made up and it was open to them to address me if they wished. Applications were then made by both counsel. 6. Advocate Baker submitted there were two aspects for me to consider. He contended that the plaintiff should be disentitled to its costs of the ex parte application before the Bailiff in any event. He also submitted that the plaintiff ought to be condemned to pay, on an indemnity basis, the costs of the application to discharge the Anton Piller order. This application was based upon the premise that costs should follow the event, and the defendants had won their application hands down. Furthermore the award of costs should be on an indemnity basis because the Bailiff had been misled by the lawyers for the plaintiff as to the proper procedure, and because the plaintiff had an intention of trying to strangle the new business of the first defendant at birth. There was a public interest in the Court making it plain that there would be consequences in obtaining ex parte orders without making appropriate disclosure and giving the judge hearing the ex parte application the help he was entitled to receive. 7. Advocate Cook, for the fourth defendant, also applied for indemnity costs and asserted the plaintiff's conduct was unreasonable, which justified that application. Advocate Parslow, for the first and second parties cited also made a claim for costs. 8. In response, Advocate Sinel submitted that the defendants had applied not only to discharge the Anton Piller order but also to discharge the injunctions in their entirety. They have therefore not been entirely successful because the Court had substituted other injunctions for the protection of the plaintiff. Furthermore the evidence which was tendered by the defendants was very unsatisfactory. Most importantly, the defendants knew full well that they had copied information of the plaintiff in a clandestine fashion. He reminded us that the defendants had removed hard copy documents, had attempted to divert the plaintiff's clients, and that the affidavits which had been tendered by the defendants were misleading, contradictory and not full. Indeed on the third day of the hearing, Advocate Redgrave, he said, had accepted that there were some grounds for a form of ex parte injunctive relief. His submission was that, in truth, if the defendants had played straight, none of this might have been necessary. 9. In his submission, the plaintiff might have dealt with the application before the Bailiff imperfectly, but there had been an honest attempt to present a difficult matter under extreme time pressure. There was a public interest in deterring defendants from doing what these defendants had done. As to Advocate Baker's two aspects, the first question of whether or not the plaintiff should have its costs of applying for the ex parte orders in the first place should be deferred to the trial judge, and as to the second, the plaintiff had been largely successful, because alternative injunctions had been imposed, and the defendants had in any event misbehaved. For these reasons, the plaintiff was entitled to costs. The application to discharge the ex parte orders 10. Advocate Baker rightly identifies the starting point which is that the costs should follow the event unless there is some reason for holding otherwise. What is the event? It seems to me that the main event was the discharge of the Anton Piller order. It is true, as

Advocate Sinel says, that other relief was sought by the defendant's summons dated 23 rd April, and not all that relief was granted. It is also true that the Court substituted other injunctions for those which were obtained ex parte. Nonetheless, the primary basis for the application was that the Anton Piller orders had been wrongly obtained, the result of which was that the defendant's hardware and software had been wrongly removed from them. Some items still had not been returned at the date of the hearing. 11. Accordingly I would be minded to accept the argument that the defendants had been more successful than the plaintiff in relation to their application. Nonetheless, it is true that the Court substituted other injunctions. The reason that the Court did so was that it was clear that the defendants, or some of them, admitted having acted wrongfully by taking material from the plaintiff which they were not entitled to have. Advocate Sinel is therefore right to say that in some respects his client had partial success because the Court substituted the injunctions as set out at paragraph 96 of the judgment. 12. As we indicated at paragraphs 38 to 50 inclusive of our judgment, the Court was of the view that the plaintiff made a serious error in its application for the Anton Piller order. What makes the error serious is that the judge was asked to make, on an ex parte basis, one of the most draconian orders the Court could make, interrupting the rights of the defendants to property and privacy, and the Bailiff in this case was persuaded to make it despite being troubled by the fact that the order enabled the plaintiff to remove property which actually belonged to the first defendant. He made the order firstly because he was told that it was in a standard form and in accordance with English procedure, and secondly because he understood that the equipment would be returned as soon as possible. 13. One can therefore well understand the submission of Advocate Baker that there was a public interest in making it plain that there will be consequences if an ex parte order of this draconian nature is obtained otherwise than in accordance with the principles of making full and frank disclosure to the Court of all matters which were relevant for the Court's consideration, and that any failure in this respect should be marked by an award of indemnity costs. 14. The principles for the award of indemnity costs were recently summarised by the Court of Appeal in *Leeds United Football Club Limited v Western and Levy*

[2012] JCA 088 . I proceed today on the basis of those principles. 15. If it were not the case that the defendants had admitted wrong doing, I would have awarded them the costs of applying to discharge the Anton Piller order on an indemnity basis. However, that wrongdoing has been admitted. It is true that it perhaps might not have been admitted at this stage had the Anton Piller order not been obtained and the defendants' actions exposed as a result of the information obtained by the plaintiff through that order. On the other hand, given that the order was wrongfully obtained, there is a case for saying that the plaintiff ought to have no benefit from it at all. 16. However, I must make an order which achieves as fair a result as is possible in circumstances where:- (i) The defendants have admitted wrong doing in taking information belonging to the plaintiff, to which they were not entitled. (ii) The plaintiff might legitimately be concerned as to wrongful abuse of that information, and the defendants accepted that some form of interim relief might be appropriate. (iii) Nonetheless the plaintiff wrongly obtained orders to which it was not entitled, misleading the Bailiff in the course of doing so. 17. I do not place much, if any,

emphasis on Advocate Sinel's submissions as to the unacceptability of the affidavits which were sworn by the defendants within three working days of service of the order. The timetable for providing such affidavits was extremely short, but, more significantly, the plaintiff had removed all the computer hardware upon which the defendants might have relied for the purposes of preparing the affidavits. 18. Taking all these factors into account, and having considered the arguments which were put to me by counsel, I remain of the view that the fairest order is to recognise the defaults on both sides and to make no order as to costs in relation to the application by the defendants for the discharge of the Anton Piller orders as requested in their summons of 14 April. Costs of the ex parte application 19. The defendants seek an order that, come what may, the plaintiff should not be entitled to any order for costs which includes the application before the Bailiff for the Anton Piller order. The plaintiff contends this should be reserved to the trial judge. 20. In my judgment, the plaintiff acted wrongly before the Bailiff for all the reasons set out in the Court's judgment in May, and, regardless of whether the plaintiff is ultimately successful at trial, it should not have its costs of that application. This order reflects the importance of making full and frank disclosure, in accordance with the rules, when applying for ex parte relief. That is particularly important where as draconian an order as an Anton Piller order is requested. Costs of the parties cited 21. At the hearing of 13 May, 2013, Advocate Parslow requested that the Court order his clients to be discharged from the proceedings and have asked for costs. In response, Advocate Sinel asserted that the conduct of the parties cited was highly suspicious. He asserted that the affidavit sworn by the second party cited was inconsistent with other affidavits filed, and that an Order of Justice would be issued against the second party cited the following day. In those circumstances, the second party cited was, with Advocate Parslow's agreement, discharged from the proceedings and no order for costs was made. I am not clear whether any Order of Justice has in fact issued against the second party cited, nor am I indicating any encouragement that it should be so issued. I merely record what was said at the time in this connection. Authorities Nautech-v-CSS Ltd and Others

[2013] JRC 089 . Leeds United Football Club Limited v Western and Levy

[2012] JCA 088 . Page Last Updated: 16 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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